DATO' SERI ANWAR IBRAHIM

v.

PP

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CRIMINAL APPEALS NO: W-05-26-99 & W-05-27-99]
2 MARCH 2000

[In the matter of an application by Dato' Seri Anwar Ibrahim to disqualify a Judge of the Court of Appeal made in the course of the hearing of his appeal]

CONSTITUTIONAL LAW: *Judges - Appointment of - Article 122B(1) Federal Constitution - Yang di-Pertuan Agong to act on advice of Prime Minister after consulting Conference of Rulers - Meaning of 'consult' - Whether Yang di-Pertuan Agong not bound by advice or opinion of Conference of Rulers - Article 40(1A) - Import of - Whether Yang di-Pertuan Agong must act on advice of Prime Minister - Whether appointment of judges a matter between Yang di-Pertuan Agong and Prime Minister personally - Application by Ex-Deputy Prime Minister to disqualify judge on ground that he had expressed adverse comment on judge before Conference of Rulers - Whether comment of no consequence - Whether application unsustainable*

RULING OF THE COURT

Per Lamin Mohd Yunus PCA:

The Appointment Of Judges To The High Court, Court of Appeal And The Federal Court

Before we make known of our decision regarding the application made to us by the appellant yesterday the effect of which whether this quorum should continue to sit with or without YA Datuk Hj. Mokhtar bin Hj. Sidin, we feel we should explain the relevant provision of the Federal Constitution relating to the appointment of judges of the High Court, of the Court of Appeal and of the Federal Court. That provision is art. 122B(1) and it reads:

> 122B. (1) The Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and (subject to Article 122C) the other judges of the Federal Court, of the Court of Appeal and of the High Courts shall be appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers.

The intention of this article is clear ie, the Yang di-Pertuan Agong must act on the advice of the Prime Minister. However, the Yang di-Pertuan Agong is required to **consult** the Conference of Rulers before making the appointment. To consult means to refer a matter for advice, opinion or views. For a quick reference as to the meaning of this word, I refer to the *Black's Law Dictionary*, the latest edition which is the seventh edition, the word "consultation" carries the meaning *inter alia* thus:

> The act of asking the advice or opinion of someone ... consult vb.

To "consult" does not mean to "consent". The Federal Constitution uses the words "consent" and "consult" separately. For example the word "consent" is used in art. 159(5) of the Constitution which states that the amendments to certain provisions of the Constitution cannot be passed by Parliament without the "consent" of the Conference of Rulers. The *Black's Law Dictionary* provides for the meaning of the word "consent" thus: "Agreement, approval or permission as to some act or purpose esp. given voluntarily by a competent person."

So in the matter of the appointment of judges, when the Yang di-Pertuan Agong **consults** the Conference of Rulers, he does not seek its "consent". He merely consults. So when the Conference of Rulers gives its advice, opinion or views, the question is, is the Yang di-Pertuan Agong bound to accept. Clearly he is not. He may consider the advice or opinion given but he is not bound by it. But art. 40(1A) of the Constitution provides specifically as to whose advice the Yang di-Pertuan Agong must act upon. Clause (1A) of art. 40 reads:

> (1A) In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with such advice.

Clearly therefore the Yang di-Pertuan Agong must act upon the advice of the Prime Minister. The advice envisaged by art. 40(1A) is the direct advice given by the recommender and not advice obtained after consultation.

So in the context of art. 122B(1) of the Constitution, where the Prime Minister has advised that a person be appointed a judge and if the Conference of Rulers does not agree or withholds its views or delays the giving of its advice with or without reasons, legally the Prime Minister

can insist that the appointment be proceeded with. Likewise in the case of a request from the Conference of Rulers for revocation of an appointment or an advice from it to revoke an appointment already made, the Prime Minister need not respond.

What we want to impress here in the light of the information given to us by the appellant yesterday ie, something purportedly to have been expressed by the Conference of Rulers in the nature of an advice cannot be held against YA Datuk Hj. Mokhtar bin Hj. Sidin for the Yang di-Pertuan Agong is not bound to accept that advice. Further the content of the advice has nothing to do with the hearing of a case in this court. We consider the role played by the appellant at the Conference of Rulers has no bearing on the present appeals before us. In the final analysis in the matter of the appointment of judges, it is really a matter between the Yang di-Pertuan Agong and the Prime Minister personally. It does not even become the concern of the Deputy Prime Minister. Therefore whatever opinion or views expressed by the Deputy Prime Minister at the Conference, it must be assumed in law that it is the opinion or views of the Prime Minister. In the case of Datuk Hj. Mokhtar bin Hj. Sidin, the appointment was made and he is here. The appointment can no more be the subject of further argument. Should there have been adverse comments against him in the process, they are of no consequence. Further if we may impress that since the deliberations in the official meeting of the Conference of Rulers were held in secrecy, they should remain where they are for all time.

For the purpose of the present proceedings, I have asked Datuk Hj. Mokhtar bin Hj. Sidin how he feels towards the appellant. He has said to me and my colleague that he has nothing against him. We are convinced. He has given the assurance that he will perform his function and discharge his duties as a judge without fear or favour in order to serve the ends of justice. It must be borne in mind that the present cases before us are in the nature of appeals and we, as appellate judges have only to rely on the records before us.

May we take this opportunity also to advise anyone appearing in court with counsels before he wishes to make any application or to say anything, he must consult his counsels and to say whatever he wishes to say through his counsels so as to avoid any unpleasant situation. For example if he utters or expresses something contemptuous in court, he can be charged for contempt. Such a situation can be avoided if he has consulted his counsels.

With that note we have decided that this same quorum will continue the hearing of the present appeals.